Tan Sow Mooi v Rainbow Paradise Beach Resort Bhd & Anor

HIGH COURT (PENANG) — CIVIL APPEAL NO PA-12BNCvC-15–06 OF 2023
KENNETH ST JAMES J
8 JUNE 2025

Civil Procedure — Appeal — Appeal against decision of sessions court — Plaintiff evicted from resort unit despite having long term lease agreement when resort converted to quarantine centre — Action based on trespass and nuisance — Whether sessions court omitted to apply evidence on elements of trespass and nuisance — Whether sessions court misdirected itself on finding of unjust enrichment — Whether defendants expelled plaintiff from her unit — Whether sessions court disregarded effect of lease agreement — Whether defendants' act constituted interfering with plaintiff's 'comfortable and convenient enjoyment' — Whether defendants for committing trespass and nuisance

The plaintiff had a long-term lease over her suite in the defendants' resort. She was not just a resort guest who stayed at the resort for a holiday, but a permanent resident at the resort. When the Covid-19 pandemic hit the country, the defendants decided to convert their resort into a quarantine centre. When the defendants did that, they had to get the plaintiff to move out of her suite. The plaintiff asserted that she was given a mere 30 minutes to vacate her unit, which was insufficient time for her to pack and take her personal belongings (including what was in her refrigerator). As a result, she had to rent another room elsewhere to live in, buy clothes, shoes, personal items and groceries. The plaintiff, therefore, sued the defendants to get back possession of her suite and for damages suffered, namely for trespass and private nuisance. The sessions court dismissed the plaintiff's claim. Hence, the present appeal.

Held, allowing the appeal with costs:

(1) The sessions court had made findings of fact, merely in the context of whether the plaintiff had proven the facts to justify the reliefs and remedies sought. But the sessions court did not make findings of fact in the context of whether the plaintiff had proven the material facts to satisfy the elements of the causes of action for trespass and nuisance. In other words, the sessions court straightaway made findings on whether the plaintiff should be granted the reliefs and remedies prayed for, instead of making findings on whether the plaintiff had proven her causes of action for trespass and nuisance, such that she should be granted the reliefs and remedies she sought. The sessions court bypassed or

side-stepped analysis of whether the plaintiff had proven the elements of trespass and nuisance. There was no analysis of the case law nor the statute law pertinent to trespass and nuisance. The sessions court straightaway found that the plaintiff should not be given the reliefs and remedies prayed for. This was a fundamental misdirection, and omission-amounting to a material error of law (see paras 38–39).

(2) The sessions court analysed the principle of unjust enrichment in the context of whether the plaintiff would be unjustly enriched if she were to be granted the remedy of damages for the 'unnecessary expenses' that she spent because she refused to move to the 24th floor of the resort and concluded that she should not be permitted to unjustly enrich herself from this suit. Here, the court had again misdirected itself into the finding on unjust enrichment because the defendants did not plead it as a defence, nor as a cause of action or basis for a counterclaim (see paras 40–41).

(3) While setting out the plaintiff 's case, referred to the lease agreement but disregarded the effect of the lease agreement, which gave the plaintiff a 90-year lease over her unit. Therefore, the defendant's act-of notifying and causing the plaintiff to vacate her unit-constituted expelling the plaintiff from her Unit. The defendants' act also constituted interfering with the plaintiff's 'comfortable and convenient enjoyment', or, put differently, 'quiet enjoyment', of her unit. It was fine for the defendants to decide to do, or to authorise to be done, certain acts in the Resort. It owned and had rights over the Resort. But when those acts, or authorised acts, interfere with the plaintiff's rightful and reasonable enjoyment of her unit, the defendants may be held liable to the plaintiff for committing trespass and nuisance (see paras 42–44 & 46).

(4) The sessions court failed to consider that the defendants' decision to allow the resort to be made a quarantine centre, coupled with the notice ('D14') constituted or amounted to an act of trespass and nuisance. The sessions court did not evaluate the legal effect and the ensuing consequences of the defendants' decision to allow the Resort to be turned into a quarantine centre, nor did it address the defendants' act of notifying the plaintiff to move out and relocate to another unit. A reasonable court, considering and evaluating the evidence (and effect) of the defendants' decision and act-would not have found that the plaintiff had failed to prove her cause for trespass and nuisance. Or, alternatively, a reasonable court would not have found that the defendants had succeeded in their defence against the claim for trespass and nuisance (see paras 52–53).

(5) The sessions court peculiarly took judicial notice that D14 was delivered to the plaintiff, instead of making a finding of fact that D14 was delivered to the plaintiff, after evaluating the contradicting evidence. The sessions

court found that 'whenever a fact is so generally known that every ordinary person may be reasonably presumed to be aware of it', the court could take judicial notice of that fact. But this principle was obviously not applicable here in this case. The fact that D14 was served on the plaintiff could not be such a fact that was so generally known to an ordinary person, such as to require the sessions court to take judicial notice of it. Hence, there were merits in the plaintiff 's appeal (see paras 61–62 & 65).

(6) The sessions court appeared to have placed a pivotal weight on making a finding that the plaintiff received the notice. And the sessions court reasoned that because she received the notice, her claim for the reliefs and remedies sought in the statement of claim could not be allowed. The sessions court had shown no nexus (connection) to the causes of action. The sessions court also appeared to have decided that since the plaintiff received the notice, it was simply not wrongful for the defendants to displace her from her Unit. The sessions court had fallen into a material error of law and the decision was not reasonably made (see paras 67–68).

[Bahasa Malaysia summary

Plaintif mempunyai suatu pajakan jangka panjang ke atas unit suites miliknya di resort kepunyaan defendan. Plaintif bukan sekadar seorang tetamu resort yang menginap di resort tersebut untuk tujuan percutian, sebaliknya merupakan seorang penghuni tetap di resort tersebut. Apabila pandemik Covid-19 melanda negara, defendan telah memutuskan untuk menukar resort mereka menjadi sebuah pusat kuarantin. Apabila defendan berbuat demikian, mereka telah menghendaki plaintif untuk berpindah keluar daripada unit suites miliknya. Plaintif menegaskan bahawa beliau hanya diberikan tempoh selama 30 minit untuk mengosongkan unitnya, yang merupakan suatu tempoh yang tidak mencukupi untuk beliau mengemas dan membawa keluar barang-barang peribadinya (termasuk barangan yang berada di dalam peti sejuknya). Akibatnya, plaintif terpaksa menyewa sebuah bilik di tempat lain untuk didiami, membeli pakaian, kasut, barangan peribadi dan barangan runcit. Oleh yang demikian, plaintif telah memfailkan tindakan terhadap defendan untuk mendapatkan semula pemilikan unit suites miliknya serta menuntut ganti rugi yang dialaminya, iaitu bagi pencerobohan dan kacau ganggu persendirian. Mahkamah sesyen telah menolak tuntutan plaintif. Oleh itu, rayuan semasa ini.

Diputuskan, membenarkan rayuan dengan kos:

(1) Mahkamah sesyen telah membuat dapatan fakta semata-mata dalam konteks sama ada plaintif telah membuktikan fakta bagi menjustifikasikan relif dan remedi yang dipohon. Walau bagaimanapun, mahkamah sesyen tidak membuat dapatan fakta dalam konteks sama ada plaintif telah membuktikan fakta material untuk memenuhi elemen-elemen bagi kausa tindakan pencerobohan dan kacau ganggu.

Dengan kata lain, mahkamah sesyen telah terus membuat dapatan sama ada plaintif patut diberikan relif dan remedi yang dipohon, tanpa terlebih dahulu membuat dapatan sama ada plaintif telah membuktikan kausa tindakannya bagi pencerobohan dan kacau ganggu, sehingga melayakkannya untuk diberikan relif dan remedi yang dituntut. Mahkamah sesyen telah memintas atau mengetepikan analisis sama ada plaintif telah membuktikan elemen-elemen pencerobohan dan kacau ganggu. Tiada sebarang analisis terhadap kes undang-undang mahupun undang-undang bertulis yang berkaitan dengan pencerobohan dan kacau ganggu. Mahkamah sesyen secara terus mendapati bahawa plaintif tidak sepatutnya diberikan relif dan remedi yang dipohon. Ini merupakan suatu salah arah asas serta suatu peninggalan yang terjumlah kepada kesilapan undang-undang yang material (lihat perenggan 38–39).

(2) Mahkamah sesyen telah menganalisis prinsip pengayaan tidak adil dalam konteks sama ada plaintif akan diperkayakan secara tidak adil sekiranya beliau diberikan remedi ganti rugi bagi 'perbelanjaan yang tidak perlu' yang dibelanjakannya kerana beliau enggan berpindah ke tingkat 24 resort tersebut, dan seterusnya membuat kesimpulan bahawa plaintif tidak sepatutnya dibenarkan untuk memperkayakan dirinya secara tidak adil melalui tindakan ini. Dalam hal ini, mahkamah sekali lagi telah tersalah arah dalam membuat dapatan mengenai pengayaan tidak adil kerana defendan tidak membangkitkannya sebagai suatu pembelaan, mahupun sebagai suatu kausa tindakan atau asas bagi tuntutan balas (lihat perenggan 40–41).

(3) Semasa membentangkan kes plaintif, merujuk kepada perjanjian pajakan tetapi mengabaikan kesan perjanjian pajakan tersebut, yang memberikan plaintif pajakan 90 tahun ke atas unit beliau. Oleh itu, tindakan defendan dalam memaklumkan dan menyebabkan plaintif mengosongkan unit beliau-terjumlah kepada pengusiran plaintif dari unit beliau. Tindakan defendan juga merupakan gangguan terhadap 'kenikmatan selesa dan kemudahan' plaintif, atau, dalam istilah lain, 'kenikmatan tanpa gangguan', terhadap unit beliau. Ia adalah dibenarkan bagi defendan untuk memutuskan untuk melakukan, atau membenarkan untuk dilakukan, perbuatan tertentu di Resort tersebut. Ia memiliki dan mempunyai hak ke atas Resort tersebut. Tetapi apabila perbuatan tersebut, atau perbuatan yang dibenarkan tersebut, mengganggu kenikmatan hak dan munasabah plaintif terhadap unit beliau, defendan boleh dipertanggungjawabkan kepada plaintif kerana melakukan pencerobohan dan kacau ganggu (lihat perenggan 42–44 & 46).

(4) Mahkamah sesyen telah gagal mempertimbangkan bahawa keputusan defendan untuk membenarkan resort tersebut dijadikan sebagai pusat kuarantin, bersama-sama dengan notis ('D14'), merupakan atau

terjumlah kepada suatu perbuatan pencerobohan dan kacau ganggu. Mahkamah sesyen tidak menilai kesan undang-undang dan akibat yang timbul daripada keputusan defendan untuk membenarkan resort tersebut ditukar menjadi pusat kuarantin, dan juga tidak menangani perbuatan defendan yang memaklumkan plaintif supaya berpindah keluar dan ditempatkan semula di unit lain. Suatu mahkamah yang munasabah, setelah menimbangkan dan menilai keterangan (serta kesan) keputusan dan perbuatan defendan tersebut, tidak akan mendapati bahawa plaintif telah gagal membuktikan kausa tindakannya bagi pencerobohan dan kacau ganggu. Atau, sebagai alternatif, suatu mahkamah yang munasabah tidak akan mendapati bahawa defendan-defendan telah berjaya dalam pembelaan mereka terhadap tuntutan pencerobohan dan kacau ganggu (lihat perenggan 52–53).

(5) Mahkamah sesyen secara pelik telah membuat penilaian kehakiman bahawa D14 telah disampaikan kepada plaintif, bukannya membuat suatu dapatan fakta bahawa D14 telah diserahkan kepada plaintif setelah menilai keterangan yang bercanggah. Mahkamah sesyen telah mendapati bahawa 'apabila sesuatu fakta itu begitu diketahui umum sehingga setiap orang biasa boleh dengan munasabah diandaikan mengetahuinya', mahkamah boleh membuat penilaian kehakiman terhadap fakta tersebut. Namun, prinsip ini jelas tidak terpakai dalam kes ini. Fakta bahawa D14 telah disampaikan kepada plaintif bukanlah suatu fakta yang diketahui umum oleh orang biasa sehingga memerlukan mahkamah sesyen membuat penilaian kehakiman terhadapnya. Oleh itu, terdapat merit dalam rayuan plaintif (lihat perenggan 61–62 & 65).

(6) Mahkamah sesyen nampaknya telah meletakkan pemberat yang amat penting terhadap dapatan bahawa plaintif telah menerima notis tersebut. Dan mahkamah sesyen memberi alasan bahawa oleh sebab beliau telah menerima notis itu, tuntutan beliau untuk relief dan remedi yang dipohon dalam pernyataan tuntutan tidak boleh dibenarkan. Mahkamah sesyen tidak menunjukkan sebarang hubungan dengan kausa tindakan. Mahkamah sesyen juga nampaknya telah memutuskan bahawa memandangkan plaintif menerima notis tersebut, maka ia adalah tidak salah di sisi undang-undang bagi defendan untuk mengusir plaintif dari unit beliau. Mahkamah sesyen telah terkhilaf dari segi undang-undang yang material dan keputusan tersebut tidak dibuat secara munasabah (lihat perenggan 67–68).]

Cases referred to

Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals [2003] 1 MLJ 567; [2003] 2 AMR 6; [2003] 1 CLJ 585; [2002] 2 MLRA 319, CA (refd)

Baxter v Camden London Borough Council [1998] 2 EGLR 29, CA (refd)

Bayangan Sepadu Sdn Bhd v Jabatan Pengairan dan Saliran Negeri Selangor

& Ors [2021] 1 MLJ 322; [2020] 8 AMR 14; [2020] 10 CLJ 321; [2020] MLRAU 245, CA (refd)

Chai Yon Len & Anor v Kamarul Jaman bin Mydin & Anor [2020] MLJU 498; [2020] 4 AMR 568; [2020] 3 MLRH 611; [2020] CLJU 401, HC (refd)

Chin Moy Yen & Ors v Chai Weng Sing & Ors [2019] MLJU 681; [2019] 1 LNS 940; [2020] 1 MLRA 122, CA (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 6 AMR 781; [2004] 4 CLJ 309; [2004] 2 MLRA 1, FC (refd)

Henderson v Foxworth Investments Ltd and another [2014] 1 WLR 2600, SC (refd)

Kwong Hing Realty Sdn Bhd v Malaysia Building Society Bhd (American International Assurance Co Ltd, third party) [1997] 5 MLJ 670; [1996] 1 MLRH 382; [1997] 1 CLJ Supp 167, HC (refd)

MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd [2016] 2 MLJ 428; [2016] 4 CLJ 665; [2016] 3 MLRA 1144; [2016] AMEJ 0743, CA (folld)

Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 8 AMR 227; [2020] 10 CLJ 1; [2020] 6 MLRA 193, FC (folld)

Projek Lebuh Raya Utara-Selatan Sdn Bhd v Kim Seng Enterprise (Kedah) Sdn Bhd [2013] 5 MLJ 360; [2013] 6 CLJ 958; [2013] 4 MLRA 68, CA (refd)

Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal [2018] 2 MLJ 177; [2018] 1 AMR 517; [2018] 2 CLJ 641; [2018] 1 MLRA 263, FC (refd)

UEM Group Bhd (previously known as UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor [2018] supp MLJ 363; [2011] 1 AMCR 338; [2010] 9 CLJ 785; [2010] 2 MLRA 668, FC (refd)

Legislation referred to

Evidence Act 1950 s 57, 57(1)(a), (1)(o)
National Land Code s 232(1)(a)
Strata Titles Act 1985 s 5(2)

Appeal from: Civil Suit No PA-A52NCVC-94–08 of 2021 (Sessions Court, Georgetown)

Andrew Chiew (with Shaleni Anpualagan) (Lee Hishammuddin Allen & Gledhill) for the appellant.

Wong Xian Zheng (with Suzzanne Tan Kim Peng) (San Law Chambers) for the respondent.

Kenneth St James J:

PRELUSION

[1] The plaintiff ('P') has a long-term lease over her suite in the defendants' resort. She is not just a resort guest who stays at the resort for a holiday. She is a permanent resident at the resort.

[2] When the Covid-19 pandemic hit the country, the defendants decided to convert their resort into a quarantine centre. When the defendants did that, for some reason, they had to get P to move out of her suite. P asserts that she was given very little time to move out. She nevertheless moved out.

[3] P sued the defendants to get back possession of her suite and for damages suffered. The sessions court dismissed her claim. She appeals to the High Court.

THE LAW ON APPELLATE INTERVENTION — THE 'PLAINLY WRONG' TEST

[4] It is vital, in this post-trial appeal, to review the law on appellate intervention. An appellate court should only interfere to disturb the findings of the first-instance court (here: the sessions court), if the sessions court was 'plainly wrong'.

[5] Our Federal Court, in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 8 AMR 227; [2020] 10 CLJ 1; [2020] 6 MLRA 193 (FC), through the written grounds of Justice Zabariah Mohd Yusof FCJ, comprehensively expounded the genesis of the 'plainly wrong' principle, through its development over the years, into its current meaning.

[6] *Ng Hoo Kui* propounded that the primary 'plainly wrong' principle, includes the following not-exhaustive elaborative tenets, and I apply them here:

(a) the sessions court's judgment is 'plainly wrong' if it was arrived at through 'no or insufficient judicial appreciation of the evidence': citing *UEM Group Bhd (previously known as UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2018] supp MLJ 363; [2011] 1 AMCR 338; [2010] 9 CLJ 785; [2010] 2 MLRA 668 (FC);

(b) this phrase of the 'lack of judicial appreciation of the evidence' encompasses these three errors:

(i) critical factual finding which has no basis in evidence (that is,

findings not based on the evidence);

(ii) demonstrable misunderstanding of the relevant evidence (that is, misunderstanding the evidence); and

(iii) demonstrable failure to consider the relevant evidence (that is, failure to consider the evidence).

(c) the sessions court's judgment is 'plainly wrong' if it was arrived at through a 'material error of law': following *Henderson v Foxworth Investments Ltd and another* [2014] 1 WLR 2600 (UKSC);

(d) the sessions court's decision is 'plainly wrong' if it 'could not reasonably be explained or justified', making it a decision 'which no reasonable judge could have reached': citing *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal* [2018] 2 MLJ 177; [2018] 1 AMR 517; [2018] 2 CLJ 641; [2018] 1 MLRA 263 (FC); and

(e) an appellate court is to evaluate whether the sessions court's decision was 'reasonably made': para 77 of *Ng Hoo Kui*.

[7] The 'plainly wrong' principle, however, is not intended to be used as a catch-all method to replace the sessions court's decision with my own (the appellate court's) decision, on the facts of the case. The Federal Court in *Ng Hoo Kui* puts it this way:

> [76] What is pertinent is that, the 'plainly wrong' test is not intended to be used by an appellate court as a mean to substitute its own decision for that of the trial court on the facts.
>
> [78] Hence following this court's ruling in *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra an appellate court should not interfere with the factual findings of a trial judge unless it was satisfied that the decision* of the trial judge was 'plainly wrong' where in arriving at the decision it *could not reasonably be explained or justified and so was one which no reasonable judge could have reached*. If the decision did not fall within any of the aforesaid category, *it is irrelevant*, even *if the appellate court* thinks that with whatever degree of certainty, it *considered that it would have reached a different conclusion from the trial judge*. (Emphasis added.)

[8] Put differently — even if an appellate court finds, on the evidence and the facts of a case, that the appellate court would have come to a different decision, the appellate court, when it is deciding on the appeal, should not bypass an analysis of the first-instance court's reasoning.

[9] To determine if the sessions court here has committed a fundamental error that warrants appellate intervention, I must consider, in the context of these elaborative tenets, the sessions court's *appreciation of the evidence and* the

sessions court's *application of the principles of law*.

[10] Another case law authority that instructs me — that the sessions court's judgment is susceptible to appellate intervention, if the sessions court: (a) fails to address, or disregards pertinent issues arising in the case; (b) fails to address, or disregards material evidence arising from the trial; (c) makes findings of fact that are not substantiated by the evidence — is *MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd* [2016] 2 MLJ 428; [2016] 4 CLJ 665; [2016] 3 MLRA 1144; [2016] AMEJ 0743 (CA). The Court of Appeal there, through the grounds of Justice Nallini Pathmanathan JCA (later FCJ) held:

> [17] The obverse or counterpart to the requirement for appellate restraint in dealing with findings of fact by the trial judge is the fundamental requirement that the judgment of first instance does in fact amount to a comprehensive and cohesive determination of the material matters comprising the subject matter of dispute before the trial judge. This requires the trial judge to undertake a full evaluation of the evidence and issues placed before the court. *A first instance judgment is open to challenge when it fails to address or wholly ignores material evidence or issues placed before it, or when bald findings of fact are made with no reasoning or evidence to substantiate such findings. Equally errors of law*, a clear misunderstanding of relevant evidence and such clearly identifiable errors will all contribute towards a decision that would be considered to be 'plainly wrong'.

Summary of the principles

[11] An appellate court will intervene in the decision of a lower court if the lower court is found to be 'plainly wrong'.

[12] These four identifiable, non-exhaustive errors by the trial judge are included in what amounts to the trial judge being 'plainly wrong':

(a) a material error of law;

(b) a critical finding of fact which has no basis in the evidence;

(c) a demonstrable misunderstanding of relevant evidence; and

(d) a demonstrable failure to consider the relevant evidence.

[13] Errors (b), (c) and (d) above can also be called 'a lack of judicial appreciation of the evidence' — the expression used in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 6 AMR 781; [2004] 4 CLJ 309; [2004] 2 MLRA 1 (FC).

[14] The Federal Court in *Tengku Dato' Ibrahim Petra* has also expressed the plainly wrong test in this manner — the decision of the trial judge could not be

reasonably explained or justified, making it a decision that no reasonable judge could have reached.

THE PERTINENT PLEADED FACTS

[15] There was a sale and purchase agreement of a lease dated 26 July 1993 ('lease agreement') between MBf Property Services Sdn Bhd and P and Lim Soon Seng, now deceased ('deceased').

[16] By the lease agreement, P and the deceased purchased the lease of an apartment suite in the Rainbow Paradise Beach Resort ('resort'). Their apartment is Room 2201 ('unit'). The lease is effectively for 90 years (30 years from the date of the lease agreement, which is automatically renewed for two further periods of 30 years each ie 30 + 30 + 30 = 90 years).

[17] By a court-sanctioned scheme of arrangement ordered in August 2004, the first defendant ('D1') was assigned the ownership of the lands on which the resort was built. In other words, D1 became the owner of the resort. D1 became the owner and lessor of P's Unit.

[18] By an assignment dated 15 November 2006, D1 assigned all the rights and obligations relating to the management of the resort to the second defendant ('D2'). I will refer to the defendants together as 'D1D2'.

[19] In April 2017, before he passed away, the deceased assigned his rights to P.

[20] In July 2020, the defendants 'allowed' P's unit (and other units) to be used as part of a Covid-19 quarantine centre in Penang. P pleads that D1D2 did this without her consent and authority.

[21] P pleads that she was told to vacate her unit in a mere 30 minutes, which was insufficient time for her to pack and take her personal belongings (including what was in her refrigerator). As a result, she had to rent another room elsewhere to live in. She had to buy clothes, shoes, personal items and groceries. She was put to loss and damage.

[22] D1D2's defences include:

(a) D1D2 did not force P to vacate her unit. If D1D2 had done so, surely P would have lodged a police report;

(b) P's unit was never used as part of the Covid-19 quarantine centre;

(c) apart from P, no one had access to her Unit. D1D2 never entered or trespassed into her unit;

(d) as the 24th floor of the resort was not quarantined, D2 offered P an alternative lodging on that floor, free of charge. But P refused to accept the offer; and

(e) on 24 July 2020, D1D2 gave P a notice dated 24 July 2020 ('notice') that the resort was *gazetted* as a quarantine centre, from 26 July 2020 (effectively a one-day notice). P, nevertheless, did not ask for more time to vacate her unit. The notice was marked as exh 'D14'.

[23] P's reply includes the averment that as a lessee or occupier, P should not be made to move to another unit in the same building, as she would be exposed to the Covid-19 virus. As such, the offer to move to the 24th floor of the resort was not proper.

WHAT ARE P'S CAUSES OF ACTION?

[24] P's statement of claim discloses two causes of action — trespass and private nuisance.

[25] Under case law — trespass upon land includes *wrongfully taking possession* of someone's property, such as a residence. It also includes *expelling* someone who is in possession of the property, from it — *Bayangan Sepadu Sdn Bhd v Jabatan Pengairan dan Saliran Negeri Selangor & Ors* [2021] 1 MLJ 322; [2020] 8 AMR 14; [2020] 10 CLJ 321; [2020] MLRAU 245 (CA).

[26] Trespass to land also includes 'any unjustifiable *intrusion*' on someone's property — *Chin Moy Yen & Ors v Chai Weng Sing & Ors* [2019] MLJU 681; [2019] 1 LNS 940; [2020] 1 MLRA 122 (CA).

[27] Nuisance, however, includes 'unduly *interfering*' with someone's 'comfortable and convenient *enjoyment*' of his or her property — *Chin Moy Yen*; or interfering with someone's 'quiet enjoyment' of his or her property — *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals* [2003] 1 MLJ 567 at p 595; [2003] 2 AMR 6; [2003] 1 CLJ 585; [2002] 2 MLRA 319 (CA); and *Projek Lebuh Raya Utara-Selatan Sdn Bhd v Kim Seng Enterprise (Kedah) Sdn Bhd* [2013] 5 MLJ 360; [2013] 6 CLJ 958; [2013] 4 MLRA 68 (CA).

[28] It may be fine for a tortfeasor to do or authorise to be done certain acts in his own property. But when the tortfeasor's acts or authorised acts *interfere with* someone's 'reasonable *enjoyment*' of his or her property, then the acts turn into an actionable nuisance — *Chin Moy Yen*.

[29] Put in a different way, a landlord is liable for 'any *mischief* that arises from the natural and necessary result' of what he has authorised to be done. The landlord has to use 'reasonable care' to ascertain what the natural and necessary result will be, from what he has authorised to be done — *Baxter v Camden London Borough Council* [1998] 2 EGLR 29.

[30] Both causes of action in trespass and nuisance are actionable without the proof of actual damage — *Kwong Hing Realty Sdn Bhd v Malaysia Building Society Bhd (American International Assurance Co Ltd, third party)* [1997] 5 MLJ 670 at p 678, at para C; [1996] 1 MLRH 382; [1997] 1 CLJ Supp 167 (HC) and *Chai Yon Len & Anor v Kamarul Jaman bin Mydin & Anor* [2020] MLJU 498; [2020] 4 AMR 568; [2020] 3 MLRH 611; [2020] CLJU 401 (HC) at para [36].

[31] Under statute law, the pertinent and applicable provisions include s 232(1)(a) of the National Land Code ('the NLC'), and s 5(2) of the Strata Titles Act 1985 ('the STA').

[32] Section 232(1)(a) of the NLC provides that a lessor is obligated to allow the lessee to 'peaceably and quietly *possess* and *enjoy*' the property, 'without any *interruption* or *disturbance*'.

[33] Section 232(1)(a) is set out below for reference:

> Section 232 Agreements by lessors and sub-lessors implied in absence of contrary intention.
>
> (1) *The following agreements on the part of the lessor shall be implied in every lease granted* under Chapter 1 *in the absence of any express provision* therein *to the contrary* —
>
> (a) that, so long as *the lessee* duly observes and performs the provisions thereof, express and implied, he *shall and may peaceably and quietly possess and enjoy the demised property* during the term thereby granted, *without any interruption or disturbance from or by the lessor* or any person lawfully claiming through or under him; ... (Emphasis added.)

[34] Section 5(2) of the STA provides that NLC provisions apply to persons to whom the STA provides. In other words, when the STA provisions apply to a lessee, the NLC provisions would apply to that lessee.

[35] Section 5(2) of the STA is set out here for reference:

> Section 5 Construction of the Act.
>
> (2) *The National Land Code* and the rules made thereunder, in so far as they are not inconsistent with the provisions of this Act or the rules made thereunder, or are

capable of applying to parcels, *shall apply in all respects to parcels held under the strata titles*. (Emphasis added.)

MY ANALYSIS OF THE SESSIONS COURT'S JUDGMENT AND THE MATTERS THAT WARRANT APPELLATE INTERVENTION

There was no analysis of P's causes of action

[36] One — I find, with respect, that the sessions court did not evaluate the evidence in the context of P's causes of action, which were trespass and nuisance. The sessions court omitted to apply the evidence to the *elements* of trespass and nuisance.

[37] Let me summarise the progression of the sessions court's grounds of judgment ('GOJ'). The sessions court set out, firstly, the reliefs and remedies that P prayed for, such as the vacant possession of P's unit; the return of P's unit in its original condition, sanitised and free from the Covid-19 virus; and damages under various heads of damage. The sessions court, secondly, set out P's case, without reference to the elements of trespass and nuisance. The sessions court, thirdly, set out D1D2's defences, again without reference to the elements of the claim for trespass and nuisance. The sessions court, fourthly, proceeded to conclude with its decision, mainly emphasising the burden of proof ie it was P's burden to prove her case, and decided she had failed to prove it.

[38] The sessions court appeared to have made findings of fact, merely in the context of whether P had proven the facts to justify the *reliefs and remedies* sought. But the sessions court did not make findings of fact in the context of whether P had proven the *material facts* to satisfy the *elements* of the causes of action for trespass and nuisance.

[39] In other words, the sessions court straightaway made findings on whether P should be granted the reliefs and remedies prayed for, instead of making findings on whether P had *proven her causes of action* for trespass and nuisance, *such that* she should be granted the reliefs and remedies she sought. The sessions court bypassed or side-stepped an analysis of whether P had proven the elements of trespass and nuisance. There was no analysis of the case law nor the statute law pertinent to trespass and nuisance. The sessions court straightaway found that P should not be given the reliefs and remedies prayed for. This is a fundamental misdirection, and omission — amounting to a material error of law.

There was, however, an impertinent analysis on unjust enrichment

[40] Two — peculiarly, the sessions court, with respect, analysed the principle of unjust enrichment in the context of whether P would be unjustly enriched if she were to be granted the remedy of damages for the 'unnecessary expenses' that she spent because she refused to move to the 24th floor of the resort. The sessions court concluded that she should not be permitted to unjustly enrich herself from this suit.

[41] I find that the sessions court had again misdirected itself on this finding on unjust enrichment because D1D2 did not plead it as a defence, nor as a cause of action or basis for a counterclaim. (D1D2 did not mount a counterclaim.)

The sessions court disregarded P's 90-year lease

[42] Three — the sessions court, while setting out P's case, referred to the lease agreement. But in its analysis of the claim, the sessions court disregarded the *effect* of the lease agreement, which gave P a 90-year lease over her unit.

[43] In the context of case law, the sessions court, with respect, failed to consider that D1D2's act —of notifying and causing P to vacate her unit — constitutes *expelling* P from her unit.

[44] D1D2's act also constitutes *interfering* with P's 'comfortable and convenient enjoyment', or, put differently, 'quiet enjoyment', of her unit.

[45] In the context of statute law, as a lessee, P is entitled to 'peaceably and quietly possess and enjoy' her unit, 'without any interruption or disturbance from or by the lessor', namely, D1D2.

[46] It is fine for D1D2 to decide to do, or to authorise to be done, certain acts in the resort. It owns and has rights over the resort. But when those acts, or authorised acts, interfere with P's rightful and reasonable enjoyment of her unit, D1D2 may be held liable to P for committing trespass and nuisance.

[47] I find that the sessions court failed to address or evaluate the legal effects of the lease agreement, which is a pivotal piece of evidence.

It was D1D2's decision to allow the resort to be turned into a quarantine centre

[48] Four — D1D2 relied heavily on the notice ('D14'), which they asserted they gave to P. In its GOJ, the sessions court placed much emphasis on the notice as well.

[49] D1D2 issued the notice to the 'unit residents' of the resort, informing them that:

(a) 'after having consulted with the Board of Directors', D1D2 'was pleased to inform and notify' the residents that the resort was *gazetted* as a quarantine centre 'with effect from 26 July 2020';

(b) D1D2 acknowledged that 'this decision might be of some inconvenience' to the residents, but D1D2 saw 'the dire need to sustain the business during these trial times'; and

(c) the 24th floor was 'a buffer (green zone) and reserved for the full time in-house permanent residents', which included P.

[50] D1D2's general manager testified that the Ministry of Tourism, Arts & Culture invited D1D2 to convert the resort into a quarantine centre.

[51] The notice discloses that D1D2's board of directors were 'consulted' and D1D2 made the 'decision' to allow the resort to be turned into a quarantine centre. P was not consulted. D1D2 did not obtain her consent. P was simply told to move out and relocate to another unit. The evidence shows that D1D2, through its general manager, had a conversation with P to ask her to relocate to the 24th floor.

[52] The sessions court failed to consider that D1D2's decision to allow the resort to be made a quarantine centre, coupled with the notice — constituted or amounted to an act of trespass and nuisance. The sessions court did not evaluate the legal effect and the ensuing consequences of D1D2's decision to allow the resort to be turned into a quarantine centre, nor did it address D1D2's act of notifying P to move out and relocate to another unit.

[53] I find that a reasonable court, considering and evaluating the evidence (and effect) of D1D2's decision and act — would *not* have found that P had failed to prove her cause for trespass and nuisance. Or, alternatively, a reasonable court would *not* have found that D1D2 had succeeded in their defence against the claim for trespass and nuisance.

The reasonable finding of fact would have been that P did not receive the notice

[54] Five — there was diametrically opposing evidence about whether P received the notice ('D14'). D1D2's version was that the notice was delivered to P on 24 July 2020. D1D2's personnel had put the notice under the unit's door. However, the personnel (Mr Brian Martin) was not called to testify to this fact, that he delivered the notice to P on 24 July 2020.

[55] P's version, on the other hand, was that she did not receive the notice. And so, she did not know the contents of the notice. Instead, she received (not on 24 July 2020, but on 26 July 2020) the *letter* dated 24 July 2020 from D1D2 addressed to 'valued *guests*' (exh 'P4'), informing the guests that:

(a) the resort was made a 'Person Under Surveillance (PUS) Centre for Malaysian Citizens returning from overseas'; and

(b) but if the guests had 'any doubts', D1D2 'will accept [their] booking cancellation without any penalty'. In other words, if the guests did not want to stay at the resort anymore, they could cancel their room bookings.

[56] I will refer to this letter ('P4') as the 'letter to guests'. When P saw this letter to guests — on 26 July 2020 (not on 24 July 2020) — P was at a loss as to what to do. P went to the resort counter to ask about what had happened; about the resort being turned into a quarantine centre. Conversations took place and P was asked to move out of her unit and relocate to the 24th floor, the green zone.

[57] P testified that D1D2 told her to vacate her unit in 30 minutes. There were military and police personnel at the resort on 26 July 2020. In cross-examination, when P was asked whether she sought the 'assistance' of the police or military personnel (since she asserted that she was forced to vacate her unit), she answered that it was the police who directed her to 'quickly move out (*keluar dengan cepat*)'.

[58] P is not proficient in English. P testified that she received the letter to guests ('P4') on 26 July 2020. She said that she received the letter to guests (and not the notice ('D14')) because she saw the words 'Dear Guests', which are contained in the letter to guests, and not in the notice (the notice was addressed to 'PR units residents'.)

[59] P then went to the resort counter to enquire about what had happened at the resort. This is consistent with the testimony of D1D2's general manager, who verified that P was at the resort counter on 26 July 2020.

[60] Instead of evaluating the competing evidence to make a finding of fact as to whether P received the notice, and whether she received the notice on 24 July 2020 — the sessions court took 'judicial notice' that 'the notice ie D14, was served on P (*notis iaitu D14 telah diserahkan kepada plaintif*)': see para [47] of the sessions court's GOJ.

[61] In other words, the sessions court peculiarly took judicial notice that the notice was delivered to P, instead of making a finding of fact that the notice was delivered to P, after evaluating the contradicting evidence.

[62] The sessions court found that 'whenever a fact is so generally known that every ordinary person may be reasonably presumed to be aware of it', the court can take judicial notice of that fact. But this principle is obviously not applicable here in this case. The fact that the notice was served on P cannot be such a fact that is so generally known to an ordinary person, such as to require the sessions court to take judicial notice of it.

[63] Further, a reading of s 57 of the Evidence Act 1950 on the facts that the court must take judicial notice of — such as all the laws and regulations in force in Malaysia (sub-s 57(1)(a)), and all other matters which the court is directed by law to take notice of (sub-s 57(1)(o)) — discloses that s 57 does not apply to the issues that faced the sessions court in this case.

[64] I hence find, with respect, that the sessions court's application of the judicial notice principle is a misdirection that amounts to another error that warrants appellate intervention.

CONCLUSION

[65] I find merits in P's appeal.

[66] The sessions court did not evaluate the evidence to render a judgment on whether P proved her causes of action for trespass and nuisance. Instead, the sessions court straightaway evaluated the evidence to decide whether to grant P the reliefs and remedies sought.

[67] The sessions court appeared to have placed a pivotal weight on making a finding that P received the notice. And the sessions court reasoned that because she received the notice, her claim for the reliefs and remedies sought in the statement of claim cannot be allowed. The sessions court has shown no nexus (connection) to the causes of action. The sessions court also appeared to have decided that since P received the notice, it is simply *not* wrongful for D1D2 to displace her from her unit.

[68] Applying the elaborative tenets for appellate intervention to this appeal, I find that the sessions court had fallen into a material error of law. I find that the sessions court's analysis of the evidence, and its conclusion on the evidence, as well as its application of the law to the evidence, to be 'plainly wrong' or fundamentally erroneous. I find that the sessions court had not sufficiently

appreciated the evidence. And I find that the sessions court's decision was not reasonably made.

[69] I therefore allow P's appeal.

[70] These are the orders that I make:

(a) P's appeal is allowed with costs of RM10,000 for this appeal, plus the costs of RM7,000 relating to encl 11 per order dated 13 December 2023 to be paid by D1D2 to P by 21 April 2025. Costs are subject to the allocatur. If these costs are not paid to P by 21 April 2025, interest at the rate of 5%pa on the amounts ordered shall apply from 22 April 2025 to the date of full payment (encl 11 was P's application for leave to file a supplementary memorandum of appeal, which was allowed with costs of RM7,000 for the encl 11 proceeding, fixed as costs in the cause);

(b) I allow P's claim and allow the prayers set out in para 18 of the statement of claim;

(c) re prayer 18(a) — D1D2 are to cooperate with P and to facilitate vacant possession of P's unit (known as Suite 22–16 or Room 2201) to be taken by P within 14 days from the day of judgment (21 March 2025);

(d) re prayer 18(b) — D1D2 are to engage Rentokil or an equivalent disinfection service provider to clean and disinfect P's unit before P takes vacant possession of the unit;

(e) re prayer 18(d) — D1D2 are to refund P all the maintenance and service charges that P had paid to D1D2 from July 2020 within 14 days from the date of judgment (21 March 2025);

(f) this matter is remitted to the sessions court to assess the quantum of damages re prayers 18(c), (e) to (l) of the statement of claim;

(g) as for costs in the sessions court trial proceeding, I order D1D2 to return to P the costs of RM20K ordered against P in the sessions court proceeding, and instead, D1D2 are to pay P the costs of RM20,000 for the sessions court proceeding by 21 April 2025. If these costs are not returned or paid to P by 21 April 2025, interest at the rate of 5%pa on the amounts ordered shall apply from 22 April 2025 to the date of full payment; and

(h) parties are at liberty to apply to this court in relation to the orders made here on prayers 18(a), (b) and (d) of the statement of claim.

Appeal allowed.

Reported by K Selvaraju